FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPELLANT'S REPLY BRIEF

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INTRODUCTION

As indicated in our original Brief, a proper resolution of the question presented by this case might require the consideration of five separate issues.

(1) Did the activities of Complete Auto in continuing the transportation of the motor vehicles from an out-of-state manufacturing point to dealer locations in Mississippi constitute interstate commerce?

(2) Do established constitutional principles prohibit the levy of a state privilege tax on the privilege of engaging in an exclusively interstate business?

(3) If established constitutional principles prohibit the imposition of a privilege tax on the privilege of en-

gaging in exclusively interstate commerce, should those existing principles be modified?

(4) If these existing limitations on state taxing power are to be modified, is Congress or this Court the most appropriate body to make such a modification?

(5) If the existing constitutional standards were to be changed by this Court, should any modification of the principles on which numerous taxpayers have relied be made effective prospectively or retroactively?

The Tax Commission's Brief argues at some length that the activities of Complete Auto constitute intrastate commerce. And although the Tax Commission's Brief purports to distinguish this tax from the levies proscribed by *Spector*,[1] it acknowledges the existing principle that states may not levy privilege taxes on exclusively interstate commerce.

The Tax Commission has made only indirect references to the arguments in our Brief pertaining to the policy considerations implicit in *Spector, Railway Express I*,[2] and other cases which enunciate the same rule. The Tax Commission has not discussed our position that any change in the long-existing and Congressionally-recognized standards governing privilege taxes should be made by Congress and not by this Court. Nor has the Commission replied to the point that Complete Auto relied on the principles set out in *Spector*, and that any change in the rule therein enunciated, if it is to be made at all, should be applied only prospectively.

We now respond to the arguments advanced in the Tax Commissioner's Brief.

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1. *Spector Motor Service, Inc.* v. *O'Connor*, 349 U.S. 602 (1951).

2. *Railway Express, Inc.* v. *Virginia*, 347 U.S. 359 (1954).

ARGUMENT

I. Complete Auto's Activities in Completing the Interstate Movement of the Motor Vehicles From the Manufacturing Plant to the Designated Dealers Constituted Interstate Transportation

The Tax Commission's Brief clearly reveals the Commission's basic and persistent contention. This case began, and has continued, because of the Tax Commission's obdurate adherence to one position—that the use of separate shipping documents for the rail and truck portions of the interstate journey conclusively establishes that Complete Auto's activities were intrastate commerce.[3] Indeed, the Commission's Brief[4] states:

> The only facts for consideration would be the way bills or shipping document on which the appellant transported property within Mississippi which clearly established the shipper as General Motors, Jackson, Mississippi, to a dealer also located in Mississippi, and no further need for even a consideration of any interstate question. The only pertinent fact for consideration is that General Motors, either directly or by agent, ships merchandise from themselves in Jackson, Mississippi, to a dealer located in Mississippi.

From this language, and from similar language repeated throughout the Tax Commission's Brief,[5] it is perfectly clear that the Commission has completely ignored

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3. Separate documents were prepared for the rail and truck portions of the journey because the carriers had not filed joint rates with the Interstate Commerce Commission (App. 68-69, 72-73).

4. Appellee's Brief, at 13 n. 5.

5. Appellee's Brief, at 14, 15, 17, 20, 21, and 26.

the undisputed fact that the transportation at issue in this case was an integral part of a continuous passage from a point in one state to points in other states.

The following facts are uncontroverted: (a) the intention of General Motors was to ship the vehicles from the place of manufacture in one state to various designated dealers located in other states; (b) General Motors had nothing whatsoever to do with the vehicles after they were delivered to the rail carrier; (c) the only break in the shipment of the motor vehicles was for the purpose of loading the motor vehicles from the railroad cars to the trucks; and (d) the transportation of the motor vehicles continued to the designated dealers after the change from one carrier to the other.

This Court has long held that ". . . it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. . . ." *Western Oil Refining Company* v. *Lipscomb*, 244 U.S. 346, 349 (1917). In *Railroad Commission* v. *Texas & P. Ry. Co.*, 229 U.S. 336, 341 (1913), the Court stated:

> In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases were [sic] that *it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country.* The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans (Emphasis added).

Similar language is found in numerous other decisions of this Court. See, *e.g.*, *Minnesota* v. *Blasius*, 290 U.S. 1, 9-10 (1933).

Moreover, it has long been established that when separate and independent carriers, some acting in one state and some acting in two or more states, are engaged in the transportation of a commodity from one state to another, each carrier is engaged in interstate commerce. See, *e.g.*, *The Daniel Ball* v. *United States*, 77 U.S. (10 Wall.) 557 (1871). *United States* v. *Yellow Cab Company*, 332 U.S. 218, 228-29 (1946).

The principles enunciated in these cases were presented in our original Brief. The Tax Commission's only response to our argument has been its insistence that the separate form of the shipping documents is controlling. We can find no support, however, in law or logic to support the controlling significance which the Tax Commission seems to claim for this fact.

The important fact is that, from beginning to end, the shipments involved in the present case were *through shipments*. The form of the bills of lading was simply the method adopted by General Motors to carry out its intent—of effectuating the interchange of the shipment from a rail carrier to a truck carrier in Jackson, Mississippi. Because no joint rates were filed with the Interstate Commerce Commission, General Motors was required to use separate shipping documents (App. 68-69). There was nothing unusual or significant about the form of the documents used by General Motors. In order for General

Motors to accomplish its original and only objective—transportation of the motor vehicles directly to designated dealers—it was necessary to direct the rail carrier to deliver the motor vehicles to the truck carrier which was to continue the transportation. The motor vehicles were in the custody, care, and control of one or the other of the carriers from the time of delivery to the rail carrier until delivery by the truck carrier to the respective dealer. Neither carrier performed any duties other than those ordinarily performed by interchanging carriers.

We note that the Commission's Brief devotes some fifteen pages to quotations from two state court decisions, *Convoy Company* v. *Taylor*, 334 P.2d 772 (Wash. 1959) and *Stone* v. *Dunn Brothers, Inc.*, 224 Miss. 762, 80 So.2d 802, suggestion of error overruled, 81 So.2d 712, appeal dismissed, 350 U.S. 878 (1955). Their importance to the resolution of this case, however, is much less than the Commission's Brief would indicate.

Dunn Brothers is clearly inapposite to the case at bar. *Dunn Brothers* involved the transportation of pipe from outside Mississippi to a railhead within Mississippi. At the railhead the pipe was inspected and accepted by the transmission company (which was both the shipper and the ultimate consignee). From the railhead, the pipe was delivered to various points along the right-of-way of the pipeline being constructed, in accordance with instructions given to the motor carrier by the transmission company. Of course, no particular piece of pipe had any specific destination. The Mississippi Supreme Court held that the interstate journey of the pipe terminated with delivery to the transmission company at the railhead in Mississippi. In *Dunn Brothers*, the pipe was actually inspected and accepted by the owner at the railhead before it was transferred from one carrier to another. Further,

in *Dunn Brothers* the pipe had no ultimate destination other than to be strung along the right-of-way of the pipeline in accordance with the instructions and directions of the owner. In other words, the transmission company took possession of the pipe, inspected and accepted it, and then gave directions to the truck carrier as to where and how to string the pipe along the right-of-way.

Thus, we submit that it is clear that *Dunn Brothers* provides no support for the Commission's contention that Complete Auto's activities were intrastate in nature, since General Motors did not inspect or accept the motor vehicles in Jackson, and did not redirect the motor vehicles to their final destination.

The Commission has relied on one other state court decision, *Convoy Company* v. *Taylor*, 334 P.2d 772 (Wash. 1959). That decision was not appealed to this Court. Clearly, one of the alternative bases for the holding in *Convoy Company*—that a nondiscriminatory privilege tax on exclusively interstate commerce is permissible—directly contradicts the holdings of this Court in *Spector, Railway Express, Inc.* and *Colonial Pipeline*.[6] The basis for the Washington court's alternative holding—that the motor carrier's activities were intrastate in nature—is completely unreasoned and unsupported by any authority. We submit that the decision of the Washington court, to the extent that it may provide any support for the Commission's position,[7] is erroneous.

Thus, it is and has been our position that the continuous, pre-arranged transportation of the motor vehicles from

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6. *Colonial Pipeline Co.* v. *Traigle*. 421 U.S. 100 (1975).

7. *Convoy Company* may well be distinguishable from this case, since the carrier apparently conducted some taxable intrastate business. In addition, the court's opinion apparently implies that the shipper exercised rights to redirect the motor vehicles upon their arrival at the railhead. 334 P.2d at 773.

the point of manufacture in one state to various, predesignated dealer locations in Mississippi constituted interstate commerce. This position was adopted by the trial court, which stated:

> The Court is impressed with the fact that once the vehicle was delivered to the rail carrier, General Motors had absolutely nothing further to do with the vehicle (App. 100).

We believe that the Mississippi Supreme Court also found, at least by implication, that Complete Auto's activities constituted interstate commerce. In any event, however, even the Tax Commission admits that the Supreme Court did not hold that the activities were intrastate.[8]

This dispute arose out of the Tax Commission's contention that the form of the shipping documents transformed this interstate transportation into intrastate commerce. Neither of the Mississippi courts adopted the Commission's position; both the trial court and the Mississippi Supreme Court found that the activities of Complete Auto could be taxed notwithstanding their interstate character. Thus, in its insistence that the activities of Complete Auto were intrastate commerce, the Tax Commission is in the position of urging either that this Court should reverse the State courts on this issue, or that this Court should base its decision on a theory other than the one relied upon by the Mississippi courts.

In sum, we submit that Complete Auto was clearly engaged in continuing the interstate movement of the motor vehicles. We further submit that the Tax Commission's one argument—that the separate shipping documents conclusively established the intrastate nature of the transportation—ignores the law and the undisputed facts in this case. Accordingly, this Court should reject, as the Mississippi courts rejected, the Tax Commission's argument that Complete Auto's activities were intrastate in character.

8. The Commission's Brief asserts that the Mississippi Supreme Court found it unnecessary to characterize the transportation as interstate or intrastate (Appellee's Brief, at 20).

II. A State Cannot Constitutionally Levy a Privilege Tax on Interstate Commerce

The Tax Commission's brief has admitted that *Spector* would have forbidden the imposition of this privilege tax on the transportation of motor vehicles from Jackson, Mississippi to destinations in states other than Mississippi.[9] The Tax Commission's Brief assigns *Spector* as the reason why the tax was not assessed or collected on those transportation activities. Accordingly, the Tax Commission has conceded the accuracy of the legal position stated in our original Brief—that a state cannot constitutionally levy a privilege tax on exclusively interstate commerce.

III. This Tax Is a Privilege Tax on Exclusively Interstate Commerce

Apparently recognizing the inconsistency of the opinion of the Mississippi Supreme Court with the decisions of this Court, the Tax Commission's Brief[10] has proposed an alternative argument in an effort to justify the Mississippi courts' result. Frankly, we are somewhat confused as to whether the Tax Commission is urging (a) that the tax is not a privilege tax, or (b) that the tax, although a privilege tax, is levied on something other than interstate commerce. Since the Commission's Brief appears to espouse both arguments, although they are not separately delineated, we shall respond to each in turn.

9. Appellee's Brief, at 21 and 27.

10. Appellee's Brief, at 18-20.

A. The Tax Is a Privilege Tax

The Tax Commission's attempt to reinterpret this statute as anything other than a privilege tax borders on the frivolous. Quite frankly, we are uncertain how the Tax Commission's proposed interpretation of the statute (which it asserts is the only reasonable interpretation) makes the tax anything other than a privilege tax. The Commission's attempt to reinterpret the statute at this stage of the proceedings is somewhat surprising, since the Tax Commission did not present the proposed construction (or reconstruction) of the statute to either of the courts below. Indeed, the Commission did not attempt to contradict the statement in our lower court Brief that the tax "is a tax on the *privilege* of conducting the business."[11] We submit that since this new interpretation of the statute was not presented to the state court, it is far too late in the day for the Tax Commission to advance a new construction of the state statute.

However, whether or not this new "interpretation" of the statute is timely presented, it certainly has no merit. At the outset, the statute itself makes clear that it levies "*privilege* taxes for the *privilege* of engaging or continuing in business or doing business within this state. . . ." (Emphasis added).[12]

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11. Brief of Appellant in the Mississippi Supreme Court, at 10.

12. The full text of Section 27-65-13, Mississippi Code of 1972, Vol. 9, page 12 [recodifying Section 10105, Mississippi Code of 1942 (1972 Supp.)] is as follows:

> There is hereby levied and assessed, and shall be collected, *privilege* taxes for the *privilege* of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections. (Emphasis added.)

Moreover, it is clear from prior decisions of this Court and the Mississippi Supreme Court that this Mississippi tax is a privilege tax. The plurality opinion in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U.S. 662, 666 (1949), recognizes that the statute imposes "a 'direct' tax on the 'privilege' of engaging in interstate commerce." The dissenting opinion, 337 U.S. at 670-71, contains the following language:

> From the facts, §§ 10105 and 10109 of the statute, and the opinion of the Supreme Court of Mississippi, we believe that this statute was determined by the state to impose a privilege tax for carrying on the intrastate business of common carrier of oil in Mississippi and that the amount of that privilege tax was to be determined by a measure—two percent of the gross income—of that intrastate business. Mississippi's interpretation of the meaning of its statute is binding on this Court. A federal question at once emerges—whether the shipment of the oil from the gathering point to the railroad in Mississippi, is intra- or interstate transportation. (Footnote omitted).

Of course, the statute involved in *Interstate Oil*[13] was the direct predecessor of the statute involved in this case. If anything, the current version of the statute makes it even more explicit that this tax is imposed on the privilege of engaging in commerce. Indeed, the Mississippi Supreme

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13. The statute at issue in *Interstate Oil*, Section 10105, Mississippi Code of 1942, Ann., Vol. 7A, page 324, read, prior to its amendment in 1955, as follows:

> There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows [see sections following]:

Court, in construing the current version of the statute,[14] has characterized the tax imposed thereby as "a privilege tax imposed upon the taxpayer for the privilege of doing business within the state." *Monaghan* v. *Southern Bell Telephone & Telegraph Co.*, 242 Miss. 611, 623, 136 So.2d 198, 202 (1962).

As best we can determine, the Tax Commission bases its contention that this is not a privilege tax on the theory that the tax is not "a condition precedent to doing business"[15] and the tax "is not a license to engage in business."[16] We think it abundantly clear that a statute which levies a privilege tax for the privilege of doing an exclusively interstate business is invalid, whether the statute requires compliance by the taxpayer precedent to or subsequent to engaging in business.

In any event, however, the Commission's legal premise—that the statute contains no licensing provision and no requirement for compliance before engaging in business—is flatly contradicted by the statute itself.

It is clear that compliance with the Mississippi sales tax statute is a condition precedent to engaging in business in Mississippi. Section 27-65-27,[17] Mississippi Code of 1972, Vol. 9, p. 33 [which recodified Section 10115, Miss. Code of 1942], provides, in pertinent part, as follows:

> *Any person who is engaged, or who intends to engage, in any business or activity which will subject*

14. Sections 10105 and 10109, Mississippi Code of 1942, Vol. 7A, Supp. 1972, page 280, now codified as Sections 27-65-13 and -19, Mississippi Code of 1972, Ann., Section 27-65-13 is set out at note 12 above; Section 27-65-19 is set out in Appendix A to our original Brief.

15. Appellee's Brief, at 8 and 18.

16. Appellee's Brief, at 8 and 26.

17. The full text of Section 27-65-27 is set out in Appendix A to this Brief.

> *such person to a privilege tax imposed by this chapter, shall apply to the commissioner for a permit to engage in and to conduct any business or activity* upon the condition that he shall pay the tax accruing to the state of Mississippi under the provisions of this chapter, and shall keep adequate records of such business or activity as required by this chapter. *Upon receipt of such permit, the applicant shall be duly licensed under this chapter to engage in and conduct such business or activity. . . .*
>
> * * *
>
> The commissioner is hereby authorized to revoke the permit of any person failing to comply with any of the provisions of this chapter. . . .
>
> *Any person liable for the tax who fails to obtain a permit* from the commissioner, *or who continues in business after such permit has been revoked, . . . or who fails to pay any taxes due hereunder, shall forfeit his rights to do business in this state* until he complies with all the provisions of this chapter and until he enters into [a required bond]. . . .
>
> *If any person is engaged in or continuing in this state in any business or activity without obtaining a permit, or after such permit has been revoked, . . . and without paying all taxes due by him hereunder, it shall be the duty of the commissioner to proceed by injunction to prevent the continuance of said business.* Any temporary injunction enjoining the continuance of said business shall be granted without notice by a judge or chancellor now authorized to grant injunctions (Emphasis added).

This section requires that a person who intends to engage in a taxable business within the state apply for

a "permit." Upon receipt of the permit, the taxpayer is "licensed" to engage in and conduct the business. If the taxpayer fails to secure the permit, he may be enjoined, without notice, from continuance of the business. This section clearly makes payment of all taxes due a condition precedent to continuing to do business in the state. If the tax is not paid, the taxpayer forfeits his right to engage in business until he complies with the law and posts the required bond.

In addition, Section 27-65-85,[18] Mississippi Code of 1972, Vol. 9, p. 73 [Section 10133, Miss. Code of 1942] provides that it shall be a misdemeanor for any person to engage or continue in any taxable business without procuring the "license" required by Section 27-65-27, or after the license has been revoked.

Thus, it is perfectly clear that compliance with the privilege tax statute, including the licensing provisions thereof, is a condition precedent to doing business in Mississippi.

Accordingly, there is no merit in any contention that the tax imposed by Section 27-65-13 is anything other than just what the Mississippi Legislature said that it was—a privilege tax levied on the privilege of engaging in business.

B. This Privilege Tax Is Imposed on Interstate Commerce and Not on Any Local Activity

The Commission has conceded that there is no local activity taxable by this statute connected with the shipment of vehicles by Complete Auto from Jackson, Mississippi, to dealers in other states, and that *Spector* pre-

18. The full text of Section 27-65-85 is set out in Appendix B to this Brief.

vents the Commission from imposing this tax on that transportation.[19] Thus, the Commission has conceded that the tax imposed by Section 27-65-13 was not levied on any local incidents or activities such as the maintenance of personnel or equipment in the state, or doing business in the corporate form in the state, or using the highways of the state,[20] since all of these activities were equally present whether the vehicles were bound to dealers in Mississippi or dealers in other states.[21] This is made crystal clear by the Commission's admissions that the local activity taxed by the statute was "sale of a transportation service being made and performed exclusively within [the] state"[22] and that the "incidence of the tax is on the intrastate sale."[23]

Thus, the Commission's contention that there is a "taxable local activity" is predicated solely on its argument that the transportation of motor vehicles from Jackson to dealer locations in Mississippi is somehow separable

19. Appellee's Brief, at 21 and 27.

20. The Commission has never advanced the contention in this case, and the Mississippi Supreme Court has never held, that this tax is levied on any local activity such as ownership of property or use of the highways.

Mississippi can and does levy other taxes on such local activities. During the years involved in this assessment Complete Auto paid substantial Mississippi income taxes, corporate franchise taxes, license plate fees, and ad valorem taxes (Exhibit C-5, App. 91-93).

21. The dissenting opinion in *Interstate Oil, supra,* 337 U.S. at 669-670, points out that the predecessor of this Mississippi statute (see note 13 *supra*), as construed by the Mississippi Supreme Court, was not levied on any local incidents apart from the flow of interstate commerce. The opinion reasoned that such an interpretation would be inconsistent with the tax immunity which the Mississippi Supreme Court had conceded would be applicable to a pipeline engaged in an interstate business. The plurality opinion found it unnecessary to dispute the question, 337 U.S. at 666.

22. Appellee's Brief, at 19.

23. Appellee's Brief, at 27.

from the general movement of the motor vehicles from the manufacturer to the dealer. However, we submit that it is clear that the character of an interstate shipment is not affected by an interchange from one carrier to another or by the form of the shipping documents. We submit that the truck portion of the transportation was an integral part of the interstate journey and can no more be taxed than could the portion of the rail journey from the Mississippi state line to Jackson.

Accordingly, this tax is not levied for the privilege of engaging in any local activity.

IV. This Case Is Controlled by the Principles Enunciated in Spector and Railway Express I

In the light of the arguments advanced by the Tax Commission in its Brief, we view with some skepticism the Commission's assurance that it "find[s] no fault with *Spector*."[24] For example, the Tax Commission attempts to avoid the clear holding of *Spector* and *Railway Express I* by suggesting that the rule enunciated in those cases should not apply in this instance, where the interstate journey is conducted pursuant to separate shipping documents, since here there is no question of apportionment. The Commission also suggests that the statute is valid as applied to Complete Auto, since it does not discriminate against interstate commerce.[25] *Spector* itself, however,

24. Appellee's Brief, at 24.

25. The Commission has asserted other transporters performing "identical services" were subject to and paid this privilege tax. (Appellee's Brief, at 16). There is no basis in the Record whatsoever to support this assertion. Even if it were true, however, that other transporters performing "identical services" paid this tax (and Complete Auto does not concede the accuracy of the statement), then it is evident that those carriers paid taxes which the state could not constitutionally impose. We fail to

(Footnote continued on following page)

makes it crystal clear that a state lacks the power to levy even a fairly apportioned and nondiscriminatory privilege tax on interstate commerce.

The weakness of the Commission's argument—that *Spector* and *Railway Express I* speak only to "direct interstate shipment" with no change of carrier or documents—is well illustrated by the peculiar result which its application has produced in this situation. Under the Commission's theory, if General Motors had shipped the motor vehicles the entire distance to the Mississippi dealers by Complete Auto, this statute could not be constitutionally applied to any part of the interstate journey. However, so the Commission asserts, because General Motors chose to ship the motor vehicles by rail for a portion of the journey, this tax may be constitutionally applied to the motor carrier portion of the journey.[26]

Whether or not the Tax Commission has urged this Court to overrule *Spector*, it is clear that the Mississippi Supreme Court has already undertaken that task. The

(Continued from previous page)

see how those carriers' election to pay the privilege tax (if indeed privilege taxes were paid by carriers performing identical services) would affect the state's power to impose an unconstitutional tax on Complete Auto.

Moreover, even if a decision in favor of Complete Auto would produce any discrimination in favor of interstate commerce, it was certainly within the power of the state to eliminate or reduce its effect. Indeed, the portion of the statute levying this tax has now been repealed, Mississippi Laws of 1972, Chapter 506.

26. The railroad waybill introduced into evidence (Exhibit C-1-A, App. 19, 20) shows that some of the motor vehicles were transported by the Southern Railway System to Meridian, Mississippi, where they were interchanged with the Illinois Central to continue the transportation to Jackson, Mississippi. (App. 56-57, 66-67). Under the Commission's theory, which attaches great importance to an interchange between carriers, the Commission could have taxed the portion of the rail journey from Meridian to Jackson, since all of the transportation by Illinois Central occurred in Mississippi.

Mississippi Supreme Court did not even attempt to distinguish, or even cite, *Spector* or *Railway Express I*.

We submit that neither the Mississippi Supreme Court nor the Mississippi State Tax Commission has advanced any sound or persuasive ground for removing the application of this privilege tax from the constitutional prohibition imposed by *Spector* and the related cases.

V. Complete Auto Would Be Severely Prejudiced by Retroactive Imposition of This Tax

The Commission's suggestion that Complete Auto will not bear the burden of this tax assessment[27] is completely unsupported and is flatly contradicted by the Record. But for Complete Auto's reliance on established constitutional principles forbidding the imposition of this privilege tax on interstate commerce, Complete Auto would have passed the tax along to General Motors. General Motors might then have passed the tax along to its dealers, although General Motors was not legally required to do so. The dealers might then have passed it along to their customers. The problem is, as pointed out at length in our original Brief, that Complete Auto, in reliance on existing constitutional standards, *did not* collect this tax from General Motors, and the uncontradicted testimony is that the cost will be borne by Complete Auto (App. 88-90).

Affirmance of the decision below would result in the retroactive imposition on Complete Auto of the burden of collecting taxes for the State. Any such departure from the constitutional principles on which Complete Auto relied would place a tremendous hardship on Complete Auto, and on other carriers similarly situated. In effect, it would amount to the imposition of a penalty for failing

27. Appellee's Brief, at 24.

to perform a duty which, at the time when performance was required (and was possible), the State could not constitutionally compel. This clear hardship, and the recognized need for detailed, legislatively established standards to regulate state imposition of privilege taxes, led us to urge strongly in our original Brief that any changes in the existing constitutional standards should be made by Congress, and not by this Court. We further suggested that any changes should not be made retroactively effective.

The Commission, nominally adhering to its position that it finds no fault with *Spector*, has not responded to these points, and we will not belabor them here. Nevertheless, we respectfully submit that the points must be given careful consideration if this Court does what the Commission insists is unnecessary and considers any modification of the rule enunciated and reiterated in *Spector*, *Railway Express I*, and *Colonial Pipeline*.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

Section 27-65-27, Mississippi Code of 1972, Annotated (recodification of Section 10115, Mississippi Code of 1942).

§ 27-65-27. Permit to engage in business.

Any person who engages, or who intends to engage, in any business or activity which will subject such person to a privilege tax imposed by this chapter, shall apply to the commissioner for a permit to engage in and to conduct any business or activity upon the condition that he shall pay the tax accruing to the state of Mississippi under the provisions of this chapter, and shall keep adequate records of such business or activity as required by this chapter. Upon recepit of such permit, the applicant shall be duly licensed under this chapter to engage in and conduct such business or activity. Said permit shall continue in force so long as the person to whom it is issued shall continue in the same business at the same location, unless revoked by the commissioner for cause.

The commissioner shall require of every person desiring to engage in business within this state, who maintains no permanent place of business within this state, a cash bond or an approved surety bond in an amount sufficient to cover twice the estimated tax liability for a period of three months. Provided, however, that the bond shall in no case be less than one hundred dollars and that the tax may be prepaid in lieu of filing bond if the amount is approved by the commissioner. This bond shall be filed with the commissioner prior to the issuance of a permit to do business and before any such person may engage in business within this state. Failure to comply with the provi-

sion will subject such person to the penalties provided by this chapter.

The commissioner is hereby authorized to revoke the permit of any person failing to comply with any of the provisions of this chapter, after giving to the person holding such permit ten days' notice of the intention of the commissioner to revoke such license. Unless good cause be shown within said ten days why such permit should not be revoked, the commissioner may revoke such permit, and revocation of such permit, or engaging or continuing in business after such permit is revoked, shall subject such person to all the penalties imposed by this chapter.

Any person liable for the tax who fails to obtain a permit from the commissioner, or who continues in business after such permit has been revoked, or who fails to make his returns for taxation as provided, or who fails to keep adequate records and invoices provided by this chapter, or who fails or refuses to permit inspection of such records, or who fails to pay any taxes due hereunder, shall forfeit his rights to do business in this state until he complies with all the provisions of this chapter and until he enters into a bond, with sureties, to be approved by the commissioner, in an amount not to exceed twice the amount of all taxes estimated to become due under this chapter by said person for any three month period, conditioned to comply with the provisions of this chapter, and pay all taxes legally due by him.

If any person is engaged in or continuing in this state in any business or activity without obtaining a permit, or after such permit has been revoked, or without filing a required bond, or without keeping and allowing inspection of all records required by this chapter, or without making a return, or returns, and without paying all taxes due by him hereunder, it shall be the duty of the commissioner

to proceed by injunction to prevent the continuance of said business. Any temporary injunction enjoining the continuance of such business shall be granted without notice by a judge or chancellor now authorized to grant injunctions.

APPENDIX B

Section 27-65-85, Mississippi Code of 1972, Annotated (recodification of Section 10133, Misssissippi Code of 1942).

§ 27-65-85. Penalties for failure to comply with the chapter.

It shall be unlawful for any person to engage or continue in any business for which a tax is imposed by this chapter without procuring a license as required by section 27-65-27 of this chapter, or after such license has been revoked, or who shall fail or refuse to make the return provided to be made in section 27-65-33 of this chapter. It shall be unlawful for any person to make any false or fraudulent return or false statement in any return, with intent to defraud the state or to evade the payment of the tax or any part thereof; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof; or for the president, vice-president, secretary or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this chapter with the intent to evade the payment of the tax due. It shall be unlawful for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commissioner, or his duly appointed agent, as required by this chapter, includ-

ing the records of any common carrier, bank, wholesale or retail dealer in any kind of merchandise whether in regard to his own or another's return; or to fail or refuse to permit the inspection or appraisal of any property by the commissioner or his duly appointed agent; or to refuse to offer testimony or produce any record as required by this chapter. It shall be unlawful for any person using the public roads and highways of this state for the transportation of merchandise for sale, whether such person be a contract carrier or operating a private vehicle, other than a common carrier operating under the interstate commerce commission or the Mississippi public service commission, and having a permanent office in this state where proper records of merchandise transported are kept and available for inspection by the commissioner or his agents, to fail to have in his or her possession at all times while such merchandise is being transported, and allow inspection of, the invoices or sales tickets correctly disclosing the nature and quantity of such merchandise and the consignor and consignee of each article being transported. However, the records of a common carrier shall be open for inspection at any time for the purpose of obtaining any information bearing upon the administration of this chapter. In the case of any vehicle engaged in the transportation of merchandise for sale, neither belonging to nor operated by a regulated common carrier and not keeping complete records in this state, the commissioner or his authorized agents may examine any invoices or sales tickets carried by the person in charge of such vehicle, and may compare them with the character and quantity of merchandise being transported and the consignee thereof, for the purpose of ascertaining whether or not the provisions of law are being complied with. The absence of such invoices or delivery or sales tickets indicating to whom said merchandise belongs, or is to be delivered, in the hands of such

person so engaged in transporting the merchandise, shall be prima facie evidence that such person is transporting such merchandise in violation of this chapter and liable for all penalties imposed under this section.

Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than five hundred dollars, or imprisoned not exceeding six months in the county jail, or punished by both such fine and imprisonment, at the discretion of the court, within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent return or statement, with the intent aforesaid shall be guilty of the offense of perjury and, on conviction thereof, shall be punished in the manner provided by law.

The commissioner may require the attendance of any person and take his testimony with respect to any matter pertaining to any taxpayer's liability for taxes under this chapter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper or other data when required to do so, such failure or refusal shall be reported to the attorney general, the district attorney or county attorney, who shall thereupon institute proceedings in the circuit court of the county where such witness resides to compel obedience to any summons of the commissioner, or his authorized agent. Said proceedings shall be by petition for citation to such person refusing to obey such summons, to show cause why such person should not be required to obey such summons; and the circuit judge of the district may hear such petition in term time or vacation upon two days' notice to the person

sought to be cited; and the circuit judge may enter such order as he may deem proper, and punish any failure to comply with such order as for any other contempt of said court. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the justice of the peace courts; and such compensation shall be paid from the proper appropriation for the administration of this chapter.